

From: Mark Pruner
To: Microsoft ATR
Date: 1/28/02 6:52pm
Subject: Web Counsel comments

Ms. Hesse:

Attached as a WordPerfect file is our comments on the proposed DOJ/Microsoft settlement. Please confirm receipt at your earliest convenience.

Mark Pruner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action No. 98-1232

MICROSOFT CORPORATION,

Defendant.

STATE OF NEW YORK *ex rel.*

Attorney General ELIOT SPITZER, *et al.*,

Plaintiffs,

vs.

Civil Action No. 98-1233

MICROSOFT CORPORATION,

Defendant.

WEB COUNSEL, LLC'S

COMMENTS ON DOJ'S REVISED PROPOSED FINAL JUDGMENT

Web Counsel, LLC is an interactive marketing company that will be harmed if the Proposed Final Judgment agreed to by the Department of Justice and Microsoft Corporation is approved. We believe that the proposed judgement is not in the public interest, and while not perfect, the dissenting states proposal is much closer to the remedy that the U.S. Supreme Court has required to "unfetter a market from anticompetitive conduct," to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future."

We fully support the remedies proposed by California, Connecticut and the other dissenting. Their comments are incorporated herein by reference and the material set forth below is meant to complement and extend the remedies proposed by the dissenting states.

WE THEREFORE, submit these comments as allowed by the Tunney Act.

MTC-00028903_0002

I. Microsoft will push the limits of any judgement and will not be cooperative with any voluntary enforcement mechanism.

Microsoft has shown a history of not living up to the spirit of their prior settlements and agreements. As examples:

1. Microsoft's first settlement with the Justice Department included a two word phrase that Microsoft used as a loophole to totally gut the settlement's effect in the marketplace. The proposed DOJ/Microsoft settlement is replete with phrases such as "provided that", "except that", "so long as" etc. Microsoft will certainly use these phrases to thwart the few significant restrictions in the proposed settlement.
2. The Tunney Act provides that Microsoft is to report all contacts with government officials. Microsoft as usual has taken a very narrow reading of this requirement and not reported many contacts, particularly with legislative branch official.
3. Bill Gates' was very uncooperative in his deposition. What should have taken a day stretched to 3 days. He did his best to avoid answering questions, by arguing such things as the definition of the word "is".
4. Microsoft fabricated or was grossly negligent in presenting their evidence. At several times in the trial, they had to retract testimony after DOJ's counsel was able to show that the facts did not comport with the Microsoft witness' testimony.
5. Microsoft's first browser was not created by Microsoft, but rather licensed from Spyglass, a small innovative software company. The license required Microsoft to make licensing payments to Spyglass, but Microsoft held up these payments, which were vital to Spyglass to continue developing its browser. Only when Spyglass made it clear that it would no longer actively develop its browser did Microsoft make the payment it was contractually required to make.

II. Web innovation has stalled since Microsoft got a monopoly in web browsers

Prior to Microsoft entering the market for web browsers Netscape and many other companies, such as Spyglass, were developing innovate new features and services in their browsers. The first casualty of the Microsoft monopolist entering the browser battle was not Netscape, but the many smaller innovators, that had been pushing Netscape to make its product better.

Microsoft created a concept called "embrace and extend", which should be more properly called "copy and crush". Microsoft at its option will copy another company's software, buy the company or license the software. It then adds a few features and uses its monopoly profits and

tie-ins with its other monopoly products to crush the competitor. The result of this process is that the monopolist drives the small innovators out of the market. As a result innovation is stifled.

The Microsoft browser illustrates the monopolist's lack of innovation. Anyone who uses Microsoft's Internet Explorer software will find dozens of things that need improvement or that would normally motivate a user to switch to a competitor, but there are no viable alternatives. To illustrate some of the many areas in which Microsoft has failed to innovate set forth below are only some of the problems with the Microsoft browser.

1. IE is unreliable and insecure. IE crashes more often than any other software on our computer. The lost work and wasted time costs the U.S. billions of dollars. IE is unreliable, because Microsoft as a monopolist does not have abide by industry standards. It creates its own standards and changes them, regardless of the costs imposed on third parties. The browser is also very insecure and is constantly having to be patched. Were Microsoft not a monopolist of the OS, the browser and the office suite, many organizations would have rejected it for these reasons. This lack of security has now risen to the level of a national security issue. Hackers, terrorists and foreign governments can exploit this insecure product to the detriment of the U.S. government, its economy and its citizens.
2. Micropayments - Micropayments are crucial for websites that sell information, both text and images. People will pay from 10 cents to \$2.00 to read an article or look at an image or chart, but there is no widespread payment system to make these small payments. The Microsoft payment systems is clunky and invades a user's privacy, as a result, few people use it and even fewer buy articles. Because, Microsoft has kept third parties from accessing the necessary APIs and other parts of the system, the Microsoft monopoly has a has put thousands of web content providers out of business. These content providers can not sell their valuable material, because Microsoft wants to control any micro-payment system. As a result web content providers could only rely on advertising revenue, even though they could sell millions of articles and graphic images with a proper micropayment system. The necessary APIs have to be made public and barriers to the use of non-Microsoft payment systems with Microsoft software have to be removed at both the browser level and the O/S level.
3. Page editing is difficult - Billions of additional dollars are wasted every month, because web pages are so difficult to create. The difficulty of creating pages for the IE browser increases sales of Microsoft's page editing program, Frontpage. Typical of Microsoft's efforts to exclude competitors, Frontpage is designed to write proprietary codes that can't be read by other browsers or that causes these browsers to crash.

4. Bookmarks work poorly - The IE browser bookmark feature (called "Favorites" by Microsoft) is cumbersome, requiring a multi-step process. Bookmarks can only be to a file, not a spot in a file, so finding information in very long files can be very time consuming. Others have better bookmark systems, but MS has no incentive to incorporate them or improve its bookmarks. While a minor point, this functionality, like other cumbersome features in IE is used billions of times each day world-wide, so even a small improvement would huge amounts of time when added together.
5. Integration of the browser with other functions & with XML - Microsoft has discouraged efforts to easily move information, between web pages and other applications, except where Microsoft products are involved. Extensible Mark-Up Language (XML) has been around for several years, but since Microsoft has a monopoly in browsers they need not worry about a competitor developing this technology, due to the barriers to the entry found by the trial court. At the present time, browsers can display text and graphics, but humans have to organize the information displayed. XML is like the West Key System organizing information into categories for easy retrieval and use. MS is trying to monopolize this standard also and with their three monopolies is likely to succeed.
6. Browsers on non-PCs - Microsoft has tried to force variations of IE browser onto personal digital assistants (e.g. Palms) and cell phones, even though they are not suited for these devices. As a monopolist Microsoft has no incentive to develop a different type of browser for non-personal computers. If a company does develop such a non-PC system, Microsoft can move quickly to stop them, as they did with Web TV. Because of its huge monopoly profits, Microsoft was able to pay an extremely high price for this system that displayed website on TV. Once it controlled this potential competitor, Microsoft efforts to further develop this system fell short of the level expected when a non-monopolist invests that amount of money.
7. Printing sophisticated pages - Printed web pages and web pages on computer screens do not look the same. This causes tremendous difficulties for Web Counsel and other web developers. Web developers are restricted to basic layouts, even when there would be significant advantages to a more sophisticated layout. The primary solution in this area is a non-Microsoft solution, Adobe Acrobat .pdf files. Microsoft does not see this system as a threat, because .pdf files are very difficult to create and use. Microsoft efforts to make printing web pages is minimal.
8. Customizing feature - Microsoft makes adjusting and customizing the Internet Explorer browser very difficult. If a company creates a browser based service that needs a customized browser, they must hire expensive

programs and even then, customization is very limited. MS restricts API information, uses restrictive licensing and insists on maintaining IE's appearance.

From the individual's user perspective, finding the places and understanding obscured references such as "___ Use TLS 1.0" or "Show Friendly URLs" means that most people will have to use their browsers the way Microsoft wants them to use it.

Microsoft, like all monopolists, does not innovate, because they have no economic incentive to do so. Microsoft used to add innovative features to its browsers, albeit mostly copied from other companies, principally Netscape. Microsoft stopped making significant improvements once Netscape stopped innovating. Netscape stopped innovating, because Microsoft had used its monopoly to make sure that there was no money to be made in browsers.

Microsoft already owns the browser market, why should they try to do something innovative, when their market share is much more likely to go down, than up.

III. Microsoft's monopolies prevent fair competition and must controlled

Microsoft has monopolies in not only the OS and the browser, but also in the Office Suite software. (This claim was originally made in the state's complaint, but later dropped to harmonize its complaint with the DOJ complaint.) These inter-locking monopolies give Microsoft even greater power than a normal monopolist.

Microsoft's confidence in the power of their monopoly can be seen from their bail-outs of their competitors. Microsoft invested millions of dollars in Apple, the only significant operating system alternative, (although Apple's OS won't run on Intel processors.) Microsoft claimed it was an investment to support Apple, whose users bought Microsoft Office suite software for their Apple Macintoshes. While unlikely, Microsoft's true motivation became evident when they tried to prop-up Corel's WordPerfect office suite. Microsoft's effort to co-opt this competitor was so blatant, that regulators opposed Microsoft's investment and Microsoft withdrew there offer.

Microsoft's competitors know that the Microsoft's monopolies have created a \$36 billion treasure chest of monopoly profits. They also know that Microsoft will use these funds and the unlawful tactics outlined by the trial court to oppose anyone that should try to compete with them in their monopoly areas. These funds and Microsoft's hardball tactics scare away potential competitors and innovators. If the DOJ/Microsoft proposed settlement is accepted the perverse result will be that potential competitors will be even more discouraged, because they will see that Microsoft got no monetary penalty and was rewarded with a monopoly for using unlawful tactics. Even now venture capitalists reject out of hand any business plan that Microsoft might see as competing against their core monopolies.

Since Microsoft has 3 inter-locking monopolies, the remedies must be more comprehensive and certain, particularly, since Microsoft has shown that they will not live up to the spirit of the settlement language and are likely to violate the actual letter of the settlement. While I support all of the relief requested by the nine dissenting states, I believe that Microsoft should also be subject to a substantial fine so that they do not benefit from, nor use their ill-gotten gains to unlawfully further their monopolies.

IV. Enforcement

The proposed Microsoft/DOJ enforcement procedure will do little to prevent improper actions by Microsoft. The voluntary dispute resolution procedure will not work. Microsoft will either not volunteer to be punished or more likely they will drag out such procedures and Microsoft will win because of the delay.

Microsoft traditionally comes out with a major new OS about every three years (e.g. Windows 95, Windows 98, Windows XP [2001]). The success of these systems are determined in the first year, so as we have seen Microsoft has tried to constantly delay the present litigation and it has succeeded. The original complaint was filed by DOJ in May of 1998. In the meantime, Microsoft has come out with the minor OS upgrades Windows ME and Windows 2000 and the major new OS, Windows XP. None of these OS's have been restricted, by the DOJ and during this time Microsoft has continued to make extraordinary profits even during the recent down economy.

The new Windows XP has several features that continue to unlawfully leverage Microsoft monopolies, e.g. the Passport system. While it is theoretically possible to run Windows XP without the Passport system, the average user will not be able to figure this out and the software repeatedly demands that the user sign-up for the Passport system and provide their private information to be put under Microsoft's control.

If the court wants to do justice now, the final settlement must have a quick and certain arbitration procedure. Failure to include such a provision will result in Microsoft complying with the orders, but only after they are irrelevant. A clear example of this is the "concessions" that Microsoft has made as to the web browser in the proposed DOJ/Microsoft settlement. Microsoft made the concessions because, its unlawful acts have won the browser battle. Microsoft is happy to concede, here and in other areas of the proposed settlement, points that don't restrict what it actually wants to do or that are irrelevant in the marketplace.

Not only is speed essential, but the enforcement procedures must provide a way to expose Microsoft's efforts to intimidate third parties. Microsoft is notorious for threatening not only its competitors, but its customers, something that only a monopolist can do (e.g. threat to Compaq to cut off sales of Microsoft operating systems, see trial courts finding of facts.) Enforcement must include an anonymous reporting feature and substantial penalties swiftly enforced, otherwise Microsoft will continue its intimidation and accept its conduct penalty, if any, many years later after it is irrelevant.

V. The DOJ/Microsoft proposal will only lead to more litigation

Microsoft and its abuse of its monopoly have injured many parties, and regardless of how you rule, there will be substantial litigation as evidenced by the recent action brought by AOL/Time Warner against Microsoft. The AOL suit, however, also illustrates what will happen if the court adopts the proposed DOJ/Microsoft proposed settlement. Litigants, as has AOL, will move to further restrict the monopolist's actions; litigants will bring actions in the courts instead of through arbitration and Microsoft will delay this litigation for years. The resulting uncertainty will hurt the United States leadership in software at all levels.

The software industry is not prone to litigation, but companies will be left with no options to protect themselves, if this court does not provide an adequate enforcement mechanism and fair settlement, that is perceived to be fair.

VI. Java should be required

The public interest and competitive fairness require that Microsoft provide a quality Java interpreter with every copy of their web browser. Much of the functionality, that we and other web developers have built into their websites is based on the Java language. If Microsoft gets away with not providing Java support in their browser, as they have already done with Windows XP, the results will not be in the public interest:

tens of billions of dollars that have gone into programming sites in Java will be wasted

tens of thousands of websites will lose some or all of their functionality, and

Microsoft will have another monopoly, this time in web languages.

If nothing else, the DOJ/Microsoft proposed settlement, must be amended to require Java support.

WE, THEREFORE request that you reject the revised proposed final judgment by the U.S. Department of Justice and Microsoft Corporation, and

that you adopt the proposed judgement by California, Connecticut and the other dissenting states,

that you impose a substantial monetary penalty on Microsoft for their unlawful acts, and

that you grant such other relief as is requested herein and you may determine to be in the public interest.

DATED this 28th day of January, 2002

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/s/ Mark Pruner

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